JURISDICTION OF THE UNITED STATES COURT OF CLAIMS

AT the time of the Armistice, November 11, 1918, all business of any magnitude in the United States was conducted by the government, or with the government as principal customer, or under detailed and rigid governmental regulation and supervision. Enormous obligations were incurred by the government in payment for ships, lands, transportation lines, and goods taken over with or without agreement as to the amount of compensation. Contracts and orders for the manufacture of war goods were placed by the War and Navy Departments to the value of billions of dollars, a large part of which were unfulfilled November 11, 1918, and were thereafter partially or wholly canceled. Out of these transactions, claims against the government running into the hundreds of millions have arisen, some of which, probably the greater part, have been or will be amicably settled or compromised by the departments. Other claims will not be satisfactorily adjusted and the question will be asked, What redress has the claimant against the United States? [1]

Few people, relatively few lawyers even, realize that it is possible to sue the United States and obtain a judgment. The Court of Claims, in which this can be accomplished, is perhaps better known as an investigating commission to aid Congress in dealing with private bills, but its real judicial function is so unfamiliar that a former assistant attorney-general, who defended many cases before it, has described it as "The Unknown Court." [2] As the United States, which is always the defendant in this court, is sued here only by its consent, and only to the extent to which it has consented to be sued, it is important to anyone who has a claim against the United States and who contemplates suit to know just what jurisdiction the United States has consented to confer on this

[1] In preparation of this article I have been aided by suggestions from members of the Court of Claims Bar, including William H. Stayton, Esq., of Washington, D. C.

[2] Houston Thompson, now a member of the Federal Trade Commission.

court, and what concurrent jurisdiction, limited in amount and less frequently exercised, has been conferred on the District Courts.[3]

1. The Claim

First of all a legal claim must exist. Legal obligations of the United States and obligations on which suit may be brought against it in a court are not identical classifications. Justice Brandeis recently observed that "The United States, when it creates rights in individuals against itself, is under no obligation to provide a remedy."[4] Nearly ninety years ago a Justice of the same Supreme Court said, "It is true, the payment of a debt cannot be enforced against the government by suit; but claims against it are none the less legal or equitable on that account."[5] As early as 1797 the existence of legal claims against the government was recognized in a statute permitting them to be set off in suits by the government against claimants.[6]

Claims arise from two principal sources: (*a*) a legal transaction of the government, *e. g.*, a contract; and (*b*) a statute expressly creating a liability. As to contracts, the United States has, as an incident of statehood, contractual capacity. Congress has distributed the power to contract throughout the various departments, and prescribed the method of its exercise.[7] If the United States by its lawfully authorized representatives makes a promise under circumstances which would in the case of a business corporation constitute a contract there is no reason why the agreement should not be called a contract by the United States. Regardless

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[3] Jud. Code, 1911, § 24 (20). It has finally after much uncertainty been decided that an appeal lies directly from the District Courts to the Supreme Court in cases under this jurisdictional heading. J. Homer Fritch, Inc., *v.* United States, 248 U. S. 458 (1919).

[4] United States *v.* Babcock, 250 U. S. 328, 331 (1919).

[5] Heirs of Emerson *v.* Hall, 13 Pet. (U. S.) 409 (1839). See also United States *v.* Bank of the Metropolis, 15 Pet. (U. S.) 377 (1841).

[6] Act of March 3, 1797, c. 20, § 4, 1 Stat. at L. 515.

[7] Dugan *v.* United States, 3 Wheat. (U. S.) 172 (1818); United States *v.* Tingey, 5 Pet. (U. S.) 115 (1831); United States *v.* Bradley, 10 Pet. (U. S.) 343 (1836); United States *v.* Lane, 3 McLean (U. S.) 365 (1844); Dikes *v.* Miller, 25 Tex. 281 (1860). Important features in the exercise of the power to contract are that contracts for purchase and construction in normal times must be made after advertisement and bids, and that contracts must be in writing, signed by both parties and duly filed. U. S. Rev. Stat. 3744.

of direct enforceability against the state by judicial process, federal and state bonds have been treated as property, and as negotiable instruments by the courts.[8] By drawing a draft, the United States has been held to assume the usual obligations of a party to a negotiable instrument.[9] The statutes creating the Court of Claims, in providing that it shall have jurisdiction over claims based on contract,[10] tacitly assume that the United States enters into contracts, thus creating legal obligations against itself.

Takings of private property give rise to many claims. A taking is a legal transaction. Even where there is no actual agreement as to compensation, in view of the constitutional requirement that no property be taken without payment of "just compensation," [11] it is a fair inference as a matter of fact that the government intends to assume a contractual obligation when it takes what it recognizes to be private property. The courts have found an "implied contract" in such cases.

The second class of claims is based on statutes. The United States may assume a liability not based on a legal transaction and to which it was not previously legally bound. For example it may grant a pension, which is essentially a gratuity, in the legal sense, or it may create for itself an obligation to make compensation for a tort of its servants, something for which it is not inherently liable, as in case of collision between a warship and private vessel,[12] or infringement of patent.[13]

A conspicuous group of claims which might be made against a private corporation but cannot be made against the United States, save where expressly assumed by statute, are torts of a representative. It was recently asserted "Government must pay where it wrongs. There are no arguments against it save, on the one hand, the dangerous thesis that the state-organs are above the law, and,

[8] Bonaparte *v.* Appeal Tax Court of Baltimore, 104 U. S. 582 (1881); Plummer *v.* Coler, 178 U. S. 115 (1900).

[9] United States *v.* The Bank of the Metropolis, 15 Pet. (U. S.) 377 (1841).

[10] Act of February 24, 1855, 10 STAT. AT L. 612; JUD. CODE, 145.

[11] UNITED STATES CONSTITUTION AMENDMENT, 5. ". . . nor shall private property be taken for public use without just compensation."

[12] 37 STAT. AT L. 1285; 19 STAT. AT L. 89. See The Hesperos, 252 Fed. 858 (1918); Boyers Sons *v.* United States, 195 Fed. 490 (1912); "Admiralty Claims against the Government," George De Forest Lord, 19 COL. L. REV. 467.

[13] Act of June 25, 1910, 36 STAT. AT L. 851. See Cramp & Sons *v.* International Co., 246 U. S. 28 (1918).

on the other, the tendency to believe that ancient dogma must, from its mere antiquity, coincide with modern need." [14] It is submitted that there is a *petitio principii* in the first sentence quoted. It is assumed that government has wronged, that in cases of tort "*qui facit per alium fecit per se*" is a literal statement of fact, instead of a dogmatic legal fiction used to describe vicarious responsibility.[15]

The doctrine of *respondeat superior* is an exception to the usual rule of torts that responsibility is confined to the proximate consequences of wrongful act. It is commendable in its common-law application. The employer who for his personal profit, or for the gratification of any personal interest, causes a servant however well chosen or well instructed to act and to come into contact with strangers, should support the risk of injuries incident to his activities, rather than the injured strangers. Numerous instances of torts by servants are not within the rule of *respondeat superior*. A fellow servant's tortious injury does not create liability on the part of the master because the injured servant in entering the employment is supposed to assume the risk,[16] according to the leading case. It may also be said that he is not within the class for which the *respondeat superior* rule is devised. He is not a stranger, but a member of the group for whose benefit the enterprise is conducted, whether he receive certain wages, or uncertain profits. The patient in a hospital cannot recover against it for injuries caused by negligence of a nurse,[17] while a stranger run over by a careless ambulance driver has a cause of action.[18] A university is not liable to a student injured in the laboratory by a negligent instructor.[19]

Fellow servants and beneficiaries of charitable institutions are not strangers, but more or less participants in enterprises carried on in part for their benefit. The individualistic common law applies the assumption of risk formula. However it may be with *subjects*, the *citizen* is in a similar category. He is part of the en-

[14] "The Responsibility of the State in England," H. J. Laski, 32 HARV. L. REV. 447, 453.

[15] Justice Holmes' Essay, "Agency," 5 HARV. L. REV. 1, 20–21; 3 SELECT ESSAYS ANGLO-AMERICAN LEGAL HISTORY, 411.

[16] Priestly *v.* Fowler, 3 M. & W. 1 (1837).

[17] Powers *v.* Massachusetts Hospital, 101 Fed. 896 (1899).

[18] Hordern *v.* Salvation Army, 199 N. Y. 233, 92 N. E. 626 (1910).

[19] Parks *v.* Northwestern University, 218 Ill. 381, 75 N. E. 991 (1905).

terprise of organized democratic government. He is part of the operating force, as he helps directly or indirectly to put public servants in office, and they are there for the benefit of each and every citizen. He is not in the position of a stranger to the proprietor of a private business conducted for profit. As regards him, there is not the same reason for asserting as a short-cut formula that he has been wronged by the *government* when a public servant has in the negligent or abusive exercise of his functions injured him.

It is submitted that governmental non-liability in tort is not a doctrine whose only justification is that it is, but that it is a doctrine characteristic of the individualism of the common law, as it existed down to the end of the nineteenth century prior to the era of "socialization" [20] of the law.

It is in accord with the spirit of the times to assert the justice and expediency of general state liability for torts.[21] A tendency of the several states to assume liability for torts in certain instances can be noted.[22] The United States has recently assumed liability in several matters of a tortious nature. The holder of a patent is protected against infringement by a servant of the government.[23] A Workmen's Compensation Act [24] protects federal employees. Persons injured by government operation of the railroads have the same remedy as before.[25] Vessels of the Shipping Board leased or chartered to private operators and used as merchant ships may be libeled in event of liability incurred in operation just as a privately owned vessel.[26] Congress has even directed the War and Navy Departments to adjudicate claims for property damages done by training operations including use of airships,[27] and to compensate for damages done by the expeditionary forces in allied countries in accordance with the law of those countries.[28]

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[20] "Socialization" occasionally meets with vigorous protest from the more conservative. See "Reconstruction," R. D. Weston, 28 HARV. GRAD. MAG. 193.

[21] 32 HARV. L. REV. 447; 30 HARV. L. REV. 20; 19 COL. L. REV. 467.

[22] 30 HARV. L. REV. 25, note 21.

[23] See note 13.

[24] U. S. COMP. STAT., 1916, § 8932.

[25] Act of March 21, 1918, 40 STAT. AT L. 456, § 10. See Dahn *v.* McAdoo, 256 Fed. 549 (1919).

[26] 39 STAT. AT L. 529, § 9. See The Lake Monroe, 250 U. S. 246 (1919); The Florence H., 248 Fed. 1012 (1918).

[27] Act of July 11, 1919, chaps. 8, 9.

[28] Act of April 18, 1918, 40 STAT. AT L. 532.

2. Establishment of the Court

Though a state may incur an obligation, its consent is necessary for a judicial remedy. As Justice Gray has said:

" . . . it would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject him to repeated suits as a matter of right, at the will of any citizen, and to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on the government in war and peace, and the money in his treasury." [29]

To permit the same remedies against the government as against a private corporation, attachment, garnishment, execution, injunction, would be inexpedient. But no substantial inconvenience or detriment seems to have resulted from the limited remedies which have thus far been afforded.

In England, suit against the Crown in cases of contract and takings of private property follow as a matter of course, the filing of the "Petition of Right." [30] We have no sovereign person in the United States to whom such a petition could be addressed. Claimants unable to get satisfactory treatment by the auditors in the appropriate departments, or to set off against a debt due the government under the Act of 1797,[31] have been obliged to petition Congress. Congress has usually referred petitions to committees and if the claim is ever reported back for action made up for long delay in process by generosity in the award. In a few instances suit in the courts has been authorized.[32]

It seemed desirable that there be a permanent commission of a judicial character to investigate claims submitted to Congress, and to submit findings in judicial form, and decrees in the form of bills ready for enactment. Thus claimants would be assured some measure of certainty and prompt action, and the country protected against imposition and over-impulsive generosity. In 1855 [33] the Court of Claims was established to "hear and determine all

[29] Briggs *v.* Lightboats, 11 Allen (Mass.) 157, 162 (1865).

[30] 32 HARV. L. REV. 447; Feather *v.* Regina, 6 B. & S. 257 (1865).

[31] See note 6.

[32] United States *v.* Clarke, 8 Pet. (U. S.) 436 (1834); Clark *v.* Clark, 17 How. (U. S.) 315, 317 (1854); Van Ness *v.* United States, 4 Pet. (U. S.) 232 (1830).

[33] 10 STAT. AT L. 612.

claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, . . . which may be referred to said court by either house of Congress." It was not to give judgments, but to report its findings and opinions to Congress, and in case it approved of a claim, prepare a bill for its payment. In 1863 [34] the court was authorized to render judgment, subject to appeal to the Supreme Court and an estimate by the Secretary of the Treasury of the amount required to pay the judgment. The latter provision was held by the Supreme Court inconsistent with possession by the Court of Claims of judicial character, and it therefore declined appellate jurisdiction.[35] The provision was then repealed by Congress [36] and thereafter it has not been doubted that the Court of Claims is an authentic, genuine court.[37]

3. Jurisdiction of the Court

As the government can be sued only in the instances and under the conditions to which it has consented [38] the claimant must find warrant for his petition under some of the Acts of Congress which enumerate the subjects of jurisdiction in the court. The latest statement of the permanent jurisdiction is in the Judicial Code of 1911, Sections 145 and 162.[39] The various headings will be described in detail.

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[34] 12 STAT. AT L. 765.

[35] Gordon *v.* United States, 2 Wall. (U. S.) 561 (1864); Opinion, Taney, J., adopted by the court after his death, 117 U. S. 697 (1864); Montgomery *v.* United States, 49 Ct. Cl. 575, 601 (1914).

[36] 14 STAT AT L. 9; Degroot *v.* United States, 5 Wall. (U. S.) 419 (1866).

[37] United States *v.* Klein, 13 Wall. (U. S.) 128 (1871); O'Grady's Case, 22 Wall. (U. S.) 641 (1874).

[38] United States *v.* Babcock, 250 U. S. 328 (1918); Ill. Cent. R. *v.* Pub. Utilities Com., 245 U. S. 493, 504 (1918).

[39] Act of March, 1911, 36 STAT. AT L. 1087–1169.

"Sec. 145. The Court of Claims shall have jurisdiction to hear and determine the following matters:

"First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however*, That nothing in this section shall be construed as giving to the said court

A. "All Claims (Except for Pensions) Founded upon the Constitution or any Law of Congress" [40]

Pensions being a gratuity [41] are more appropriately dealt with by Congress and an executive department than by a court. So far as a pension granted has accrued it is a claim founded on a law of Congress which would be within the jurisdiction of the court but for this express exception. The War Risk Insurance Act has provided for jurisdiction in the District Courts.[42] It is submitted that the jurisdiction of the Court of Claims is not excluded by implication.

The principal contribution from the Constitution is the provision "Nor shall private property be taken for public use with-

jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as 'war claims,' or to hear and determine other claims which, prior to March third, eighteen hundred and eighty-seven, had been rejected or reported on adversely by any court, department or commission authorized to hear and determine the same.

"Second. All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the government in said court. *Provided*, That no suit against the Government of the United States, brought by any officer of the United States to recover fees for services alleged to have been performed for the United States, shall be allowed under this chapter until an account for said fees shall have been rendered and finally acted upon as required by law, unless the proper accounting officer of the Treasury fails to act finally thereon within six months after the account is received in said office.

"Third. The claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility on account of loss by capture or otherwise, while in the line of his duty, of Government funds, vouchers, records, or papers in his charge, and for which such officer was and is held responsible.

"Sec. 162. The Court of Claims shall have jurisdiction to hear and determine the claims of those whose property was taken subsequent to June the first, eighteen hundred and sixty-five, under the provisions of the Act of Congress approved March twelfth, eighteen hundred and sixty-three, entitled 'An Act to provide for the collection of Abandoned property and for the prevention of frauds in insurrectionary districts within the United States' and Acts amendatory thereof where the property so taken was sold and the net proceeds thereof were placed in the Treasury of the United States; and the Secretary of the Treasury shall return said net proceeds to the owners thereof, on the judgment of said court, and full jurisdiction is given to said court to adjudge said claims, and statutes of limitations to the contrary notwithstanding."

[40] The exception of pensions was introduced by the Tucker Act, 1887, 24 Stat. at L. 505. Claims founded on the Constitution were added.

[41] Harrison *v.* United States, 20 Ct. Cl. 122 (1885); 21 R. C. L. 242.

[42] Act of September 2, 1914, 38 Stat. at L. 711; Act of October 6, 1917, 40 Stat. at L. 410.

out just compensation." [43] If there is agreement for compensation of course there is express contract. If without agreement, the government takes, recognizing the title of the owner and not claiming adversely, the law presumes an implied contract.[44] Where the government claims title to the property taken, it incurs no liability.[45] The owner has a remedy against the government representative who acted unlawfully, as he is not protected by his office from personal liability.[46]

The question of what is a taking causes some difficulty. There is no liability for merely consequential damage,[47] nor for occasional trespass where no intention of continued use is shown.[48] But a permanent destruction, as by flooding, constitutes taking.[49] In-

[43] AMENDMENT, Art. V.

[44] United States *v.* Great Falls Mfg. Co., 16 Ct. Cl. 160 (1880), 112 U. S. 645 (1884); United States *v.* Lynah, 188 U. S. 445, 464 (1903); Morris *v.* United States, 30 Ct. Cl. 162 (1895); Hersch *v.* United States, 15 Ct. Cl. 385 (1879).

[45] Hill *v.* United States, 149 U. S. 593 (1893); Tempel *v.* United States, 248 U. S. 121 (1918). A taking of a vessel found in a belligerent port erroneously as captured enemy property is perhaps a tort, but gives rise to no liability on the part of The Herrera *v.* United States, 222 U. S. 558 (1912). A purchase from a person other than claimant is not a taking of his property. Jackson *v.* United States, 27 Ct. Cl. 74 (1891).

[46] Lane *v.* Watts, 234 U. S. 525 (1914); Philadelphia *v.* Stimson, 223 U. S. 605, 619 (1912); Belknap *v.* Schild, 161 U. S. 10, 18 (1896). But one cannot by suit against an official get in substance relief against the United States, where it is not liable. Oregon *v.* Hitchcock, 202 U. S. 60 (1906); Louisiana *v.* McAdoo, 234 U. S. 627 (1914); United States *v.* Daniels, 231 U. S. 218 (1913).

[47] Gibson *v.* United States, 166 U. S. 269 (1897); Scranton *v.* Wheeler, 179 U. S. 141 (1900); Bedford *v.* United States, 36 Ct. Cl. 474 (1901), 192 U. S. 217 (1904); MacArthur *v.* United States, 29 Ct. Cl. 191 (1894); Hayward *v.* United States, 30 Ct. Cl. 219 (1895); Johnson *v.* United States, 31 Ct. Cl. 262 (1896).

[48] Peabody *v.* United States, 46 Ct. Cl. 39 (1911), 231 U. S. 530 (1913).

[49] "It is clear from these authorities that where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value, there is a taking within the scope of the Fifth Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee is vested." Brewer, J., in Lynah *v.* United States, 188 U. S. 445, 470 (1903); Williams *v.* United States, 104 Fed. 50 (1900); King *v.* United States, 58 Fed. 9 (1893); Pumpelly *v.* Green Bay Co., 13 Wall. (U. S.) 166, 181 (1871). It would seem that the practical operation of the Volstead Act is analogous to the flooding cases. Though there is no taking of possession, or of title, or direct physical invasion, there is an act of the United States which necessarily and foreseeably "takes away the use and value" of machinery and of intoxicating liquors lawfully manufactured and owned. The result is intentional and so complete as to be more than consequential damage.

fringement of patent was not considered a taking [50] and created no liability prior to the Act of 1910.[51]

Damages for taking is ordinarily the commercial market value,[52] with interest from the time of actual taking to the time of a rendition of judgment.[53] It is an interesting question of immediate importance, whether in case of taking of property in such extraordinary demand as ships during the war emergency the very high offered prices in the market are to be the criteria of "just compensation." Another interesting question is whether prices fixed by the fuel administration,[54] less than could have been obtained in a free market, are conclusive in cases of requisitions by the War and Navy Departments.

An unlawful interference with the constitutional rights of the person does not give rise to an enforceable claim.[55]

Jurisdiction may be based on a law of Congress, where a statute creates an obligation to pay money to claimant: for example, the statutes requiring return of excess payments for public lands [56] or excess taxes.[57] Specific performance of an obligation to do some act other than payment of money cannot be obtained in this court.[58]

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[50] Schillinger *v.* United States, 155 U. S. 163 (1894); Harley *v.* United States, 198 U. S. 229 (1905); Farnham *v.* United States, 49 Ct. Cl. 19 (1913), 240 U. S. 537 (1916). Compare Crozier *v.* Krupp, 224 U. S. 290, 305 (1912).

[51] 36 STAT. AT L. ch. 423, p. 851.

[52] "In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted: that is to say, what is it worth from its availability for valuable uses?" Field, J., in Boom Co. *v.* Patterson, 98 U. S. 403, 407 (1878); United States *v.* First National Bank, 250 Fed. 299 (1918); Northern Pac. Ry. Co. *v.* No. Amer. Tel. Co., 230 Fed. 347 (1915), 254 Fed. 417 (1918); United States *v.* Chandler-Dunbar, W. P. Co., 229 U. S. 53 (1913). Value is to be determined as of the time of taking. United States *v.* Gill, 20 Wall. (U. S.) 519 (1874). Consequential damages to other than parcel taken not to be considered. Sharp *v.* United States, 191 U. S. 341 (1903).

[53] United States *v.* Rogers, 257 Fed. 397 (1919).

[54] United States *v.* Pa. Cent. Coal Co., 256 Fed. 703 (1918).

[55] Basso *v.* United States, 49 Ct. Cl. 700 (1914), 239 U. S. 602 (1916).

[56] United States *v.* Laughlin, 249 U. S. 440 (1919).

[57] United States *v.* Realty Co., 237 U. S. 28 (1915).

[58] United States *v.* Jones, 131 U. S. 1 (1889). The act provides for the enforcement of *claims*, refers to *amounts in controversy*, *sums due* by judgments, leading to the conclusion Congress intended the court to do nothing other than decree payment of money.

The War Emergency legislation creates many claims, some of which are expressly referred to the Court of Claims for adjudication, if the department concerned cannot effect amicable settlement.[59] Other acts do not refer to the court, but clearly provide for the creation of claims over which it would have jurisdiction.[60] Still other acts concurrently with creating the claims provide exclusive jurisdiction for their settlement in some executive department.[61]

B. Regulations of an Executive Department

Regulations issued by the head of a department under authority vested in him by Congress and acquiesced in by Congress have the force of law.[62] They are important as limiting the obligation to

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[59] Act of March 1, 1918, authorizing Shipping Board to acquire land, houses, buildings, for use of employees in shipyards. 40 STAT. AT L. 438, ch. 19.

Act of April 26, 1918, authorizing Secretary of Navy to take over land for purpose of ordnance proving grounds. 40 STAT. AT L. 537.

Act of May 16, 1918, authorizing President to acquire land and buildings for housing of workers in war industries. 40 STAT. AT L. 550.

Act of April 22, 1918, authorizing President to take over street railways for transportation of shipyard workers. 40 STAT. AT L. 535.

Act of July 10, 1918, authorizing President to take over telegraphs, telephones, and cables. 40 STAT. AT L. 904.

Act of July 18, 1918, authorizing President to requisition use or services of vessels and of docks and shipping facilities. 40 STAT. AT L. 913, 915.

Act of October 5, 1918, authorizing President to take over mines, smelters, minerals, etc. 40 STAT. AT L. 1009.

Act of March 21, 1918, authorizing President to take over transportation systems. 40 STAT. AT L. 451.

Act of October 6, 1917, commissioner of patents to withhold patent in public interest; inventor to recover royalty if device used by government. 40 STAT. AT L. 420.

Act of June 15, 1917, authorizing President to acquire ships, plants, etc: 40 STAT. AT L. 182.

[60] Act of August 25, 1919. Act for relief of contractors and sub-contractors under pre-war contracts with government who have been hampered by increased costs and priority rulings. Claims to be submitted to Secretary of Treasury.

Act of July 11, 1919, ch. 809, authorizing war and navy departments to pay claims for damage to property incident to training operations.

See as to exclusiveness departmental remedy, McLean *v.* United States, 226 U. S. 374 (1912); Mitchell *v.* United States, 21 Wall. (U. S.) 350 (1874); Purssell *v.* United States, 46 Ct. Cl. 509 (1911); United States *v.* Babcock, 250 U. S. 328 (1919).

[61] Act of March 2, 1919, authorizing Secretary of Interior to settle claims for research on war materials, without jurisdiction in any court. 40 STAT. AT L. 1272, 1274.

[62] Harvey *v.* United States, 3 Ct. Cl. 38 (1867); Maddux *v.* United States, 20 Ct. Cl. 193 (1885).

which the government is committed by implied contract,[63] and as against the contractor when acted on by him constituting terms of express contract.[64]

C. Contract Express or Implied

Like a corporation the United States has capacity to enter into contracts in the exercise of its constitutional powers. Like a corporation it acts through representatives. Unlike a representative of a corporation, the representative of the government can bind in express contract only to the extent of his actual authority.[65] There is no application of doctrines of apparent authority and estoppel. One dealing with a government representative is charged with knowledge of the particular statutes and regulations creating his authority and prescribing the manner of its exercise.[66]

An important rule of statutory law in government contracts is the requirement that they must be in writing, duly executed by the government and by the contractor.[67] Unless so executed there is no right created against the government, so far as the contract is executory. Owing to the haste necessary in the placing of war orders the Armistice found many manufacturers who had made commitments and commenced performance of so-called "informal contracts" who were left high and dry by cancellations without the technical right to hold the government for a breach and without even the benefit of the adjustments provided for by the cancellation clauses in formal contracts. For their relief Congress

[63] Arthur *v.* United States, 16 Ct. Cl. 422 (1880); N. Y., N. H. & H. R. *v.* United States, 251 U. S. 123 (1919).

[64] Gulf Transit Co. *v.* United States, 43 Ct. Cl. 183 (1908).

[65] Filor *v.* United States, 9 Wall. (U. S.) 45 (1869); Whiteside *v.* United States, 93 U. S. 247 (1876); Camp *v.* United States, 113 U. S. 648 (1885); Hazlett *v.* United States, 115 U. S. 291 (1885); Cartas *v.* United States, 48 Ct. Cl. 161 (1913), 250 U. S. 545 (1919).

[66] Curtis *v.* United States, 2 Ct. Cl. 144 (1866); Strong *v.* United States, 6 Ct. Cl. 135 (1870); Thompson *v.* United States, 9 Ct. Cl. 187 (1873); Sprague *v.* United States, 37 Ct. Cl. 447 (1902); Smoot *v.* United States, 38 Ct. Cl. 418 (1903).

[67] 12 Stat. at L. 411. This affects the remedy against the government, not the substantive validity or remedy against the contractor. Clark *v.* United States, 95 U. S. 539 (1877); St. Louis Hay & Grain Co. *v.* United States, 191 U. S. 159 (1903); United States *v.* Andrews, 207 U. S. 229 (1907); United States *v.* S. S. Co., 239 U. S. 88 (1915). The statute does not affect the verbal extension of a contract, Salomon *v.* United States, 19 Wall. (U. S.) 17 (1873), nor reformation of mistake; Ackerlind *v.* United States, 240 U. S. 531 (1916).

passed the Act of March 2, 1919, authorizing the Secretary of War to "adjust pay or discharge" such agreements "upon a fair and equitable basis," no award, however, to include "prospective or possible profits on any part of the contract beyond the goods and supplies delivered to and accepted by the United States and a *reasonable remuneration* for expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform said contract or order." [68] In event of failure to settle in the department, the claimant may have recourse to the Court of Claims.

The War Department, through the Board of Contract Adjustment, has ruled that this statute is applicable to agreements express or implied between the government and a contractor containing these three essentials: (1) entered into for a purpose connected with the prosecution of the war; (2) performed in whole or in part, or expenditures made or obligations incurred upon the faith thereof prior to November 12, 1918; and (3) not executed in the manner prescribed by law.[69]

Implied contract is difficult to define. It does not include all classes of contracts implied by law as between private persons, and yet it is somewhat broader than contract implied in fact, *i. e.*, a real consentual agreement not expressed in words. It is restricted to cases in which the government has received some consideration as a result of a consentual transaction, or has taken property under circumstances from which it may be inferred that it intends to pay compensation therefor, or has received money charged with a duty to repay it, as when money is paid by mistake.[70]

The most frequent instances of implied contract, aside from takings, which may also now be made the basis for claim under the Constitution, are cases of partial or complete performance by claimant of what was intended as an express contract, but which is unenforceable as such, as for informality of execution. The contractor may in such cases recover the fair value of services or materials furnished.[71] If the government rescinds an express con-

[68] Act of March 2, 1919; 40 STAT. AT L. 1272. Italics are writer's.

[69] Decisions Board of Contract Adjustment, page 46. See "Notes on Jurisdiction of the Secretary of War," Govt. Printing Office, January 1, 1920.

[70] Knote *v.* United States, 95 U. S. 149 (1877).

[71] Salomon *v.* United States, 19 Wall. (U. S.) 17 (1873); United States *v.* Gill, 20

tract for fraud after partial performance, the contractor may recover under implied contract.[72] A contract is not implied where the whole transaction can be brought under an express contract.[73] Services voluntarily rendered without expectation of reward afford no basis for implied contract.[74] Unexpected expenses of a contractor in providing false work to enable performance of his contract do not support implied contract.[75] Actual enrichment of the government which from the circumstances, it appears, it did not intend to pay for, as improvements to land held under a void patent possession of which is resumed by the government, creates no implied contract.[76] While in an action on an express contract for royalties the government cannot show invalidity of claimant's patent,[77] it can set up that defense when sued in implied contract,[78] this illustrating the foundation of enrichment necessary for implied contract. A voluntary payment to the government without duress or mistake cannot be recovered,[79] nor if it be made in

Wall. (U. S.) 517 (1874); Clark *v.* United States, 95 U. S. 539 (1877); Grant *v.* United States, 5 Ct. Cl. 71 (1869); Adams *v.* United States, 7 Ct. Cl. 437 (1871); Wilson *v.* United States, 23 Ct. Cl. 77 (1888).

[72] Crocker *v.* United States, 240 U. S. 74 (1916). It would seem that the same right should exist if by fraud or misrepresentation of a governmental representative, a contractor is induced to give value under an express contract. The United States has been held in contract for extra expense incurred by contractors because of natural conditions not being as represented. United States *v.* Stage Co., 199 U. S. 414, 424 (1905); Hollerbach *v.* United States, 233 U. S. 165 (1914); Christie *v.* United States, 237 U. S. 234 (1915); Atlantic Dredging Co. *v.* United States, 35 Ct. Cl. 463 (1900); Atlantic Dredging Co. *v.* United States, 53 Ct. Cl. 490 (1918). U. S. Sup. Ct. Adv. Op. 1919–20, 498. Fraud in the cause of a legal transaction should give the remedy of rescission as between private persons.

[73] Ceballos *v.* United States, 42 Ct. Cl. 318 (1907), 214 U. S. 47 (1909). The United States may be held in implied contract for benefits received after session of the Philippine Islands under a contract between the Spanish government and a cable company. Eastern Extension Tel. Co. *v.* United States, 231 U. S. 326 (1913). But see Eastern, etc. Co. *v.* United States, 251 U. S. 355 (1920).

[74] Carroll *v.* United States, 20 Ct. Cl. 426 (1885); Utica, etc. Ry. Co. *v.* United States, 22 Ct. Cl. 265 (1887).

[75] Christie *v.* United States, 237 U. S. 234 (1915); Day *v.* United States, 245 U. S. 159 (1917).

[76] Bradford *v.* United States, 47 Ct. Cl. 141 (1911); Jefferson Lime Co. *v.* United States, 48 Ct. Cl. 274 (1913).

[77] Harvey Steel Co. *v.* United States, 38 Ct. Cl. 662 (1903); 196 U. S. 310 (1905).

[78] Farnham *v.* United States, 49 Ct. Cl. 19, 38 (1913).

[79] Chesebrough *v.* United States, 192 U. S. 253 (1904); United States *v.* S. C. Co., 200 U. S. 488.

compromise of a dispute,[80] but if made under illegal duress it is recoverable.[81]

Implied contract results from dealings with a government representative only where he has authority as representative to enter into such relation in behalf of the United States.[82]

D. Damages Liquidated or Unliquidated in Cases not Sounding in Tort

This clause added by the Tucker Act [83] has not very much affected the jurisdiction. The qualification "Not sounding in tort" applies to this clause only, and does not prevent jurisdiction of a claim based on a statute arising out of tort.[84] The reference to equity does not confer general equity jurisdiction. It does not authorize the court to decree specific performance [85] nor to set aside a conveyance,[86] nor to cancel a judgment lien.[87] Judgments are still only for a sum of money. In enforcing a contract the court may however reform it.[88] Under this clause admiralty jurisdiction of the federal courts may be invoked where a substantive right to payment of money exists. In this connection there has been an instance of damages recovered as not sounding in tort nor in contract, a case of salvage of goods on which duty had been paid which would have been refunded had claimant not saved the goods from destruction.[89]

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[80] Savage *v.* United States, 92 U. S. 382 (1875); Healey *v.* United States, 29 Ct. Cl. 115 (1894); Sweeny *v.* United States, 17 Wall. (U. S.) 77 (1872).

[81] De Bow *v.* United States, 11 Ct. Cl. 672 (1875) (*sub nom.* United States *v.* Norton) 97 U. S. 164 (1877).

[82] Hooe *v.* United States, 43 Ct. Cl. 245 (1908), 218 U. S. 322 (1910).

[83] 24 Stat. at L. 503, § 1.

[84] United States *v.* Lynah, 188 U. S. 445, 475 (1903); Christie Street Com. Co. *v.* United States, 136 Fed. 326 (1905); Walton *v.* United States, 24 Ct. Cl. 372 (1889).

[85] United States *v.* Jones, 131 U. S. 1 (1889).

[86] United States *v.* Holmes, 78 Fed. 513 (1897).

[87] South Boston Iron Works *v.* United States, 34 Ct. Cl. 174 (1899); Milliken Imprinting Co. *v.* United States, 40 Ct. Cl. 81 (1904).

[88] Aetna Cons. Co. *v.* United States, 46 Ct. Cl. 113 (1911).

[89] United States *v.* Cornell S. S. Co., 137 Fed. 455 (1905), 202 U. S. 184 (1906). Another salvage case treated as one of contract is United States *v.* Morgan, 99 Fed. 570 (1900), 180 U. S. 638 (1900).

E. Set-offs and Counterclaims, Liquidated and Unliquidated

This clause was first introduced in 1863.[90] The court may give judgment against the claimant if the set-off exceeds the claim,[91] but not if the petition be dismissed for lack of jurisdiction,[92] nor against an assignee.[93] Though not pleaded, it has been held that the set-off may be set up and deducted from the judgment,[94] but not if it has been pleaded and rejected by the court.[95]

F. Departmental Reference Cases

Pending claims in departments may be transmitted to the court by the department heads for examination, and report of findings of fact and law.[96] If the claimant consent to the transmission or if it appear to the court that the claim be within its jurisdiction as established by law for the rendition of judgments against the United States, it shall proceed to render judgment.

G. Congressional Reference Cases

The original purpose of the court, that it aid Congress in investigation of claims submitted to it, has been retained. Either House may refer a pending bill for investigation and report. Here, too, if it appear that the claim is within the judicial jurisdiction of the court it shall render judgment.[97] Thousands of claims were referred under this clause and the court lacking any power to institute investigation of its own motion, being dependent on the initiative of claimants, many have lain dormant for years. Most of the claims referred were barred by the Statute of Limitations, and therefore could not have been instituted by the claimants in

[90] 12 Stat. at L. 765, Allen *v.* United States, 17 Wall. (U. S.) 207 (1872); Fendall *v.* United States, 12 Ct. Cl. 305 (1876).

[91] Juridical Code, § 146; McElrath *v.* United States, 102 U. S. 426 (1880); Huske *v.* United States, 46 Ct. Cl. 35 (1910).

[92] B. & O. Railroad *v.* United States, 34 Ct. Cl. 484 (1899).

[93] Dickson *v.* United States, 31 Ct. Cl. 399 (1896).

[94] 18 Stat. at L. 481. (*Quere*, is this repealed by J. C. 297?)

[95] Bonnafon *v.* United States, 14 Ct. Cl. 484 (1878).

[96] Juridical Code, § 148. See United States *v.* New York, 160 U. S. 598 (1895) (26 Ct. Cl. 467 (1891)); Balmer *v.* United States, 26 Ct. Cl. 82 (1890); *In re* Wright, 50 Ct. Cl. 19 (1914).

[97] Juridical Code, § 151. See Montgomery *v.* United States, 49 Ct. Cl. 575 (1914) for a history of this phase of jurisdiction. On meaning of "legal or equitable," see Sac & Fox Indians, 220 U. S. 481 (1911).

the court. The Crawford Amendment to the Omnibus Claims Act, March 4, 1915, prevents hereafter an adjudication of claims barred by the provisions of any law.[98]

The court has from time to time had other important jurisdiction of a temporary nature, as the Civil War Claims, Indian Depredation Claims, Chinese Indemnity Claims. Other special jurisdiction will doubtless be given it in the future. If indemnity is collected from Germany, its distribution might naturally be entrusted to the Court of Claims. If Congress decides to purchase the unconsumed stocks of alcoholic beverages or the distilling and brewing machinery which it has in effect "taken" in so far as it has rendered it valueless to its owners, the determination of prices would naturally fall to this court.

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[98] 38 STAT. AT L. 996; Chase *v.* United States, 50 Ct. Cl. 293 (1915).